

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LAURA ZAMORA JORDAN, as her
separate estate, and on behalf of others
similarly situated,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC, a
Delaware limited liability company,

Defendant.

NO: 2:14-CV-0175-TOR

ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND

BEFORE THE COURT is Plaintiff's Motion to Remand (ECF No. 10).

This matter was heard with oral argument on September 9, 2014. Clay M. Gatens and Michael D. Daudt appeared on behalf of Plaintiff. Jan T. Chilton and John A. Knox (telephonically) appeared on behalf of Defendant. The Court has reviewed the briefing and the record and files herein, and is fully informed.

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BACKGROUND

On April 3, 2012, Plaintiff, Laura Zamora Jordan, filed and served her Complaint in Chelan County Superior Court against Defendant, Nationstar Mortgage, LLC, alleging numerous state law causes of action, including trespass, breach of contract, and violation of the Washington Consumer Protection Act, as well as violation of the Fair Debt Collection Practices Act (“FDCPA”). ECF No. 2-4. The federal cause of action alleged in the Complaint appeared as follows: “Nationstar’s and/or its agents’ actions violated the Fair Debt Collection Practices Act 15 U.S.C. et seq.” *Id.* at 5.

Plaintiff subsequently filed and served a First Amended Complaint on September 14, 2012. ECF No. 2-13. Plaintiff again alleged numerous state law claims, including trespass, breach of contract, and violation of Washington’s Consumer Protection Act, as well as violation of FDCPA. *Id.* In this amended Complaint, Plaintiff provided a more detailed assertion of her federal cause of action, including the relevant facts to support her claim under the FDCPA. *Id.* at 7-8. Defendant did not remove the case to federal court at that time.

On January 3, 2013, Plaintiff filed her Second Amended Complaint. ECF No. 2-19. In this Complaint, Plaintiff changed the nature of her suit from one captioned on her behalf and “on behalf of others similarly situated” to one that fully expressed a class action suit against Defendant. *Id.* Plaintiff did not allege a

1 specific amount in controversy in this Complaint; rather, the prayer for relief
2 requested “damages in an amount to be proven at trial.” *Id.* at 15. The Second
3 Amended Complaint again asserted a federal cause of action under the FDCPA.
4 *Id.* at 11-12. Defendant did not remove the case to federal court at that time.

5 On May 9, 2014, the Chelan County Superior Court granted Plaintiff’s
6 motion for class certification.¹ ECF No. 1-3. According to Defendant, on June 3,
7 2014, Plaintiff served responses to Defendant’s fifth set of interrogatories and
8 requests for admissions which revealed for the first time in writing that Plaintiff
9 contended the amount in controversy exceeded \$5,000,000. ECF No. 1 at 4; ECF
10 No. 1-4 at 4 and 11. Within thirty days thereafter, on June 5, 2014, Defendant
11 removed the case to this Court pursuant to 28 U.S.C. §§ 1441, 1446, and 1453.
12 ECF No. 1.

13 Plaintiff now moves to remand this case on grounds that notice of removal
14 was not timely filed. ECF No. 10.

15 DISCUSSION

16 Plaintiff moves the Court to remand this case, arguing that Defendant filed
17 its notice of removal more than two years after Plaintiff’s initial pleading in
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19 ¹ Plaintiff filed her first motion for class certification on September 27, 2013. ECF
20 2-32. Plaintiff renewed this motion on March 6, 2014. ECF 3-16.

1 violation of the removal statute. ECF No. 10. In opposition, Defendant asserts
2 that the thirty-day window to remove “reopened” when the case first became
3 removable under the Class Action Fairness Act (“CAFA”). ECF No. 14. The
4 parties disagree as to when Defendant could have reasonably ascertained the
5 amount in controversy, which is only relevant to triggering the removal time clock
6 under CAFA.² For the following reasons, the Court agrees with Plaintiff that
7 removal is time-barred.

8 **A. Timeliness of Removal**

9 Title 28 United States Code Section 1441 governs removal of cases from
10 state court to federal court. Generally, a defendant may remove a case to federal
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12 ² Plaintiff argues that Defendant’s September 6, 2013 discovery responses
13 demonstrate that Defendant was aware that the potential damages exceeded the
14 requisite amount in controversy under CAFA. ECF 10. Alternatively, Plaintiff
15 contends that the figures in Plaintiff’s motion for class certification, filed on
16 September 27, 2013, were sufficient to put Defendant on notice of the amount in
17 controversy and the opportunity to remove under CAFA. ECF 15. Defendant, on
18 the other hand, maintains that the amount in controversy was not revealed, absent
19 guesswork on Defendant’s part, until Plaintiff’s June 2014 interrogatory responses.
20 ECF 14.

1 court if the federal court would have subject-matter jurisdiction over one or more
2 of the plaintiff's claims pursuant to 28 U.S.C. §§ 1331 (federal question) or 1332
3 (diversity of citizenship). *See* 28 U.S.C. § 1441(a), (b).

4 Under federal question jurisdiction, federal district courts have original
5 jurisdiction over all claims “arising under the Constitution, laws, or treaties of the
6 United States.” 28 U.S.C. § 1331. Whether a suit arises under federal law is
7 determined by the well-pleaded complaint rule, which provides that federal
8 jurisdiction exists “only when a federal question is presented on the face of the
9 plaintiff’s properly pleaded complaint.” *Caterpillar Inc. v. Williams*, 482 U.S.
10 386, 392 (1987). When federal law creates the cause of action asserted, the case
11 arises under federal law and will allow for removal under Section 1331. *Gunn v.*
12 *Minton*, --- U.S. ---, 133 S.Ct. 1059, 1064 (2013).

13 Under CAFA, a class action may be removed to federal court based on
14 diversity jurisdiction if the three requisite elements for removal are met: there must
15 be minimal diversity of citizenship between the parties, the proposed class must
16 have at least one hundred members, and the amount in controversy must exceed \$5
17 million. 28 U.S.C. § 1332(d); *Kuxhausen v. BMW Fin. Serv. NA, LLC*, 707 F.3d
18 1136, 1140 (9th Cir. 2013).

19 Title 28 United States Code Section 1446 governs removal procedure,
20 including removal pursuant to CAFA. *Washington v. Chimei Innolux Corp.*, 659

1 F.3d 842, 847 (9th Cir. 2011) (“[T]he general principles of removal jurisdiction
2 apply in CAFA cases. The right of removal is statutory, and the requirements
3 strictly construed.”). Under Section 1446(b), a defendant must file notice of
4 removal within thirty days after receipt of an initial pleading or other document
5 that reveals a basis for removal. 28 U.S.C. § 1446(b)(1). However, if the initial
6 pleading does not provide a basis for removal, “a notice of removal may be filed
7 within 30 days after receipt by the defendant of a copy of an amended pleading,
8 motion, order, or other paper from which it may first be ascertained that the case is
9 one which is or has become removable.” 28 U.S.C. § 1446(b)(3). These have
10 been described as the first and second—thirty-day windows in which to file a
11 removal. Though this statutory time limit for removal petitions is not jurisdictional,
12 it is mandatory and a timely objection to a late petition will defeat removal.

13 *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212-13 (9th Cir. 1980). When
14 deciding the appropriateness of removal, there is a “strong presumption” against
15 removal, and a court must reject federal jurisdiction if the court holds any doubts
16 about the right of removal. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

17 Whether a defendant has notice of removability is “determined through
18 examination of the four corners of the applicable pleadings, not through subjective
19 knowledge or a duty to make further inquiry.” *Harris v. Bankers Life & Cas. Co.*,
20 425 F.3d 689, 694 (9th Cir. 2005) (adopting a bright line test). The first thirty-day

1 window is triggered by defendant's receipt of an initial pleading that reveals a
2 basis for removal. If no ground for removal is evident in that pleading, the case is
3 not removable at that stage. *Id.* A defendant "need not make extrapolations or
4 engage in guesswork; yet the statute 'requires a defendant to apply a reasonable
5 amount of intelligence in ascertaining removability.'" *Kuxhausen*, 707 F.3d at
6 1140 (citation omitted). "The fact remains, however, that we 'don't charge
7 defendants with notice of removability until they've received a paper that gives
8 them enough information to remove.'" *Id.* at 1141 (quoting *Durham v. Lockheed*
9 *Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006)).

10 Plaintiff argues that the initial Complaint, filed and served April 3, 2012,
11 triggered the thirty-day removal clock because it alleged a federal cause of action
12 under the FDCPA. ECF No. 10. Defendant, on the other hand, contends that the
13 initial Complaint's assertion of a federal cause of action was "patently inadequate"
14 to serve as grounds for federal question jurisdiction. ECF No. 14.

15 Whether or not Plaintiff's initial Complaint sufficiently alleged a federal
16 cause of action under the well-pleaded complaint rule, *Caterpillar Inc. v. Williams*,
17 482 U.S. at 392, examination of the four corners of the First Amended Complaint
18 reveals a federal cause of action under the FDCPA. Thus, Defendant had thirty
19 days from September 14, 2012, to file a notice of removal pursuant to Section
20 1446(b), to invoke federal question jurisdiction under 28 U.S.C. § 1331.

1 Moreover, Plaintiff filed a Second Amended Complaint on January 3, 2013, which
2 again fully asserted a federal cause of action under the FDCPA, but this time
3 adding detailed class action allegations. At minimum, the First Amended
4 Complaint provides the first conclusive ascertainment that the case is one which is
5 or has become removable. The Second Amended Complaint further solidifies that
6 conclusion. At oral argument, Defendant agreed with these statements.

7 Consequently, Defendant did not timely remove this action unless a thirty
8 day window reopened. Defendant contends the case became removable again
9 pursuant to CAFA when the elements of that cause of action were first ascertained
10 in a pleading. Defendant urges this Court to broadly construe removal under
11 CAFA, just as the Ninth Circuit construed federal officer removal jurisdiction
12 under 28 U.S.C. § 1442 in *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th
13 Cir. 2006). ECF No. 14. Following the Ninth Circuit's reasoning in *Durham*, in
14 which the Ninth Circuit interpreted removal under Section 1442, the Defendant
15 contends that removal under CAFA should similarly create a second and separate
16 ground for removal, even if the initial complaint provided some other ground for
17 removal. *Id.*

18 This Court is not persuaded by Defendant's policy argument not supported
19 by the wording of the statute or case law. As stated above, the general principles
20 of removal jurisdiction apply in CAFA cases. *Chimei*, 659 F.3d at 847. Although

1 certain aspects of CAFA are broader than Section 1446's general removal
2 requirements, including CAFA's exemption from Section 1446(b)'s prohibition of
3 removal more than one year after the initial pleading, Ninth Circuit precedent
4 suggests that CAFA be strictly, not broadly, construed. *Nevada v. Bank of Am.*
5 *Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) ("Removal statutes are to be 'strictly
6 construed' against removal jurisdiction.") (citation omitted); *Chimei*, 659 F.3d at
7 847 (9th Cir. 2011) ("The general principles of removal jurisdiction apply in
8 CAFA cases. The right of removal is statutory, and the requirements strictly
9 construed."); *Progressive West Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir.
10 2007) ("We have declined to construe CAFA more broadly than its plain language
11 indicates.").

12 More specifically, the Ninth Circuit has expressly stated that a defendant
13 may remove class actions under CAFA at any point so long as removal occurs
14 within thirty days of the case *first* becoming removable. *Roth v. CHA Hollywood*
15 *Med. Ctr.*, 720 F.3d 1121, 1126 (9th Cir. 2013) ("A CAFA case may be removed at
16 any time, *provided that* neither of the two thirty-day periods under § 1446(b)(1)
17 and (b)(3) has been triggered.") (emphasis added); *Abrego Abrego v. Dow Chem.*
18 *Co.*, 443 F.3d 676, 691 (9th Cir. 2006) ("Under CAFA, class actions and mass
19 actions may be removed at any point during the pendency of litigation in state
20 court, *so long as* removal is initiated within thirty days after the defendant is put on

1 notice that a case which was not removable based on the face of the complaint has
2 become removable.”) (emphasis added). Therefore, the relevant removal date is
3 the date on which the *case itself* becomes removable, rather than the date on which
4 the case first becomes removable under CAFA. Accordingly, it matters not when
5 Defendant first learned that Plaintiff was asserting a class action that met the
6 requirements of CAFA.

7 Here, Plaintiff served her First Amended Complaint on Defendant on
8 September 14, 2012. ECF No. 2-13. As stated above, Plaintiff’s First Amended
9 Complaint included a federal cause of action, violation of the FDCPA, which
10 rendered the action removable based on federal question jurisdiction. Defendant
11 failed to timely remove within Section 1446(b)’s thirty-day window. Although the
12 case later became removable under CAFA, this subsequent basis for removal did
13 not reset the removal time clock under Section 1446 and permit Defendant a
14 second opportunity to remove. Therefore, Defendant’s removal is untimely and
15 remand is appropriate.³

16 ³ Defendant orally requested the Court delay the Clerk of Court from certifying the
17 record to the state court pursuant to § 1447(c) until after it seeks discretionary
18 appellate review pursuant to § 1453(c). Section 1453(c) provides no mechanism
19 for such delay, but rather provides an expedited appeal process apparently to
20 mitigate the concerns Defendant has expressed. Further, § 1447(c) directs the

B. Request for Attorney's Fees and Costs

Plaintiff requests an award of attorney's fees and costs pursuant to 28 U.S.C. § 1447(c). Section 1447(c) provides, in relevant part, that "[a]n order remanding [a] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, where an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

Here, Defendant did not have an objectively reasonable basis for removal. Defendant cites to cases involving federal officer removal, but no cases extending those broad principles to CAFA removal, which concededly is strictly construed under the removal statute. While Defendant has made good faith policy arguments in support of removal, including arguments that would prevent the removal statute from certain gamesmanship tactics, Defendant concedes that none of those gamesmanship concerns are present in this case. Plaintiff should not bear the

Clerk of Court's action in mandatory terms. Thus, the Court declines Defendant's invitation.

1 expense of Defendant's attempt to expand or change the law when neither the facts
2 nor the law objectively support Defendant's position.

3 Accordingly, the Court will grant Plaintiff's request for attorney's fees on the
4 motion to remand. By September 24, 2014, Plaintiff shall file an affidavit and
5 itemization of costs and attorney's fees incurred solely with respect to Defendant's
6 removal. Defendant shall have until October 8, 2014 to provide its objections.

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

8 1. Plaintiff's Motion for Remand (ECF No. 10) is **GRANTED**.

9 2. Plaintiff's request for costs and expenses, including attorney's fees pursuant
10 to 28 U.S.C. § 1447(c) is **GRANTED**. The Court will retain jurisdiction
11 following remand to resolve the award of attorneys' fees and costs. *Moore v.*
12 *Permanente Medical Group, Inc.*, 981 F.2d 443, 445 (9th Cir. 1992) (district
13 court may retain jurisdiction over attorneys' fees issue after remand). By
14 **September 24, 2014**, Plaintiff shall file an affidavit and itemization of costs
15 and attorney's fees incurred solely with respect to Defendant's removal.
16 Defendant shall have until **October 8, 2014** to provide its objections.

17 3. The Court hereby **REMANDS** to the Chelan County Superior Court, State
18 of Washington, for all remaining proceedings.

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1 The District Court Executive is hereby directed to enter this Order, provide
2 copies to counsel, and mail *a certified copy of this Order* to the Clerk of the Chelan
3 County Superior Court. The file will remain open until the expense issue is
4 resolved.

5 **DATED** this September 9, 2014



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Thomas O. Rice
THOMAS O. RICE
United States District Judge